(8)

No. 91-502

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, ET AL.,
Petitioners,

VS.

FEDERAL EXPRESS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

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SUPPLEMENTAL STATEMENT

On September 23, 1991, the California Public Utilities Commission ("CPUC") filed its petition for certiorari herein.

On November 22, 1991, respondent Federal Express Corporation filed its brief in opposition. On that same day, amicus curiae briefs in support of the petition were filed by forty-six of the fifty States, the National Association of Regulatory Utility Commissioners ("NARUC"), the California Trucking Association ("CTA") and the International Brotherhood of Teamsters ("IBT").

On November 27, 1991, the CPUC filed its reply to the brief in opposition. On that same day, the Court granted certiorari in

Morales v. Trans World Airlines, Inc., No. 90-1604. The CPUC's petition was held pending decision in *Morales*.

On June 1, 1992, the Court rendered its decision in *Morales*. The CPUC's petition for certiorari is now set for conference on June 5, 1992.

ARGUMENT

I

THE QUESTION HERE IS DISTINCT FROM THAT IN *MORALES* AND A REMAND WILL ONLY DELAY ITS FINAL RESOLUTION

The Court should grant certiorari and set the cause for briefing and oral argument because a remand to the Ninth Circuit for reconsideration in light of *Morales* is unlikely to serve any purpose save delay.

The question here is whether the Airline Deregulation Act of 1978 ("ADA"), 49 U.S.C App. § 1305(a)(1), immunizes an "air carrier"—defined as "any citizen . . . who undertakes . . . to engage in air transportation," 49 U.S.C. App. § 1301(3)—from state regulation of highway transportation activities having nothing to do with the provision of air transportation. This question is distinct from that in *Morales*, which involved the ADA's preemptive effect on state regulation of airline advertising. As the Court's decision in *Morales* makes clear,

> "some state actions may affect [airline fares] in too tenuous, remote or peripheral a manner to have pre-emptive effect. [*Shaw v. Delta Air Lines*, 463 U.S. 85 (1983),] 463 U.S., at 100, n. 21. In this case, as in *Shaw*, "the present litigation plainly does not present a borderline question, and we express no views about where it would be appropriate to draw the line." *Ibid.*

Slip op. at 14. *Morales* simply does not resolve the issue presented in this case.[1]

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[1] The United States argued for preemption in *Morales* but cited legislative history which supports the CPUC here. It said:

The parties have conceded that the question is distinct from that in *Morales*. Pet. 6 n. 5; Br. in Opp. 11; Repl. to Br. in Opp. 7. This distinctness is a primary reason why forty-six States have urged the Court to "grant certiorari with full briefing and oral argument *both* in the *TWA* cases *and* in the instant case," Br. Amicus Curiae of Forty-Six States in Suppt. 13-14 (emphasis added), and why the IBT has argued that "this case merits the attention of the Court *even more* [than *Morales*]," Br. Amicus Curiae of IBT in Suppt. 18 (emphasis added).[2]

> [The ADA] "entirely overhaul[ed] the *aviation* regulatory system." H.R. Conf. Rep. No. 1779, 95th Cong. 2d Sess. 56 (1978). [ ] The Act's ambitious objective was "to encourage, develop, and attain an *air transportation* system which relies on competitive market forces to determine the quality, variety, and price of *air* services[.]" H.R. Conf. Rep. No. 1779, *supra*, at 53.

Br. for United States as Amicus Curiae Supp'ting Resp'ts, *Morales v. Trans World Airlines, Inc.* No. 90-1604 (filed Feb., 1992), at 9 (emphasis added).

[2] In *Morales* thirty-one States stressed the extreme importance of the Court's speedy review of the instant case:

> Questions concerning the scope of § 105's language and the states' ability to exercise their traditional police powers are not limited to this case alone. *See, e.g., Federal Express Corp. v. California Public Utilities Comm'n*, 936 F.2d 1075 (9th Cir. 1991), *petition for cert. pending*, No. 91-502. That matter raises important issues which, though *distinct* from those raised in the case *sub judice*, also question what aspects of airline activities Congress meant to preempt when it enacted § 105 of the ADA. Because of the significant implications for the enforcement of state laws which provide for highway safety and fair competition, as well as the disruptive impact to the various motor carrier regulatory programs of the states, forty-six states, as *amici curiae*, have asked this Court to review No. 91-502 so that it may provide, *without delay*, guidance on the separate issue of the preemptive effect of § 105 in the circumstances of that case.

Br. of Thirty-one State Att'ys Gen'l Resp'd'ts in Suppt. of Petitioner, *Morales v. Trans World Airlines, Inc.*, No. 90-1604 (filed Jan. 10, 1992), at 16 n. 3 (emphasis added).

Because of the distinctness of the issues, it is extremely unlikely that the Ninth Circuit will alter its decision in light of *Morales*. The Ninth Circuit majority has already resisted the persuasive force of an articulate dissent which, unlike *Morales*, directly addresses the issue presented in this case. Moreover, even if the Ninth Circuit were to alter its decision on remand, the losing party will inevitably return the issue to this Court for resolution.

The issue is ripe for review now. The same reasons for reviewing the case that existed in November, 1991, exist now. The Court should grant certiorari and set the cause for briefing and oral argument.

II

A REMAND IN LIGHT OF *MORALES* IS INAPPROPRIATE WHERE THE U.S. GOVERNMENT HAS ACKNOWLEDGED THAT THE ADA DOES NOT PREEMPT STATE REGULATION OF THE INTRASTATE TRUCKING OPERATIONS OF AIR CARRIERS

A remand for reconsideration in light of *Morales*—the applicability of which is tangential at best—is inappropriate where the U.S. Department of Transportation, addressing the precise issue presented in this case, has acknowledged that the CPUC's argument is correct.

The CPUC has only recently learned that in a Report to Congress, *Impact of State Regulation on the Package Express Industry*, DOT-P-16 (Sept. 1990), the DOT acknowledged that preempting state regulation of "all surface package express . . . [or] surface transportation movements by air carriers" would "*require* legislation." *Id.*, at 52, 53-54 (emphasis added). The DOT stated that Congress would have to *amend* 49 U.S.C. App. § 1305(a)(1) to accomplish this objective. *Id.*, at 53. The DOT thus acknowledged that the ADA, as presently written, does not evince the requisite clear and manifest congressional intent to

preempt state regulation of the intrastate trucking activities of air carriers.[3]

III

DELAY IN THIS COURT'S RESOLUTION OF THE QUESTION WILL CAUSE GREAT HARM

The uncertainty created by the Ninth Circuit's decision has disrupted state economic, safety and insurance regulation in California and elsewhere. It has also engendered severe and ongoing anticompetitive harm to the many non-air-carrier trucking companies with which Federal Express's intrastate truck-only operations now compete. These harms will continue unabated until the Ninth Circuit's decision is overturned by this Court. Br. Amicus Curiae of Forty-six States in Suppt. 3, 6; Br. Amicus Curiae of NARUC in Suppt. 8, 10, 16; Br. Amicus Curiae of IBT in Suppt. 5, 11, 16; Br. Amicus Curiae of CTA in Suppt. 4-5, 16; *see also* Note 2, *supra*.

The Court's guidance is urgently needed now.

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[3] DOT recommended *against* Congress's enacting such legislation because it "would place all other types of carriers that provide intrastate express package . . . [or] trucking service at a competitive disadvantage," *id.*, at 53-54, and because it would be "bad economics," *id.*, at 58.

CONCLUSION

The Court should grant certiorari and set the cause for briefing and oral argument.

Respectfully submitted,

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